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July 19, 2010

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Via ECFS
Marlene Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Developing a Unified Intercarrier Compensation Regime; CC Docket No. 01-92

Dear Ms. Dortch:

Pac-West Telecomm, Inc. ("Pac-West"), through counsel, writes to address the series of Verizon[1] *Ex Parte* submissions[2] that, stripped of Verizon's hyperbole and invective, reduce to the following point: Verizon does not want to pay CLECs for their role in completing Verizon's intraMTA wireless traffic. As discussed below, however, Verizon's attempt to create yet another sub-category of telecommunications traffic relies upon factual misrepresentations about Pac-West's recovery efforts, faulty legal analysis, and name-calling in lieu of principled argument.

Verizon alleges that there is a lack of clarity in recent claims for "reasonable compensation" in the wake of the *North County Communications* decision ("*North County*"), which directed CLECs seeking long overdue compensation for the termination of intraMTA CMRS traffic to seek "reasonable compensation" rate determinations from the state commissions. Apparently the prospect of CLECs leveling the playing field on which they compete with ILECs by finally being able to receive compensation for the work they perform in terminating intraMTA CMRS traffic has alarmed Verizon to the point that it is now demanding emergency, extraordinary action by the Commission. However, no such emergency action is required at this time and the Commission should continue on its current course of issuing an NPRM in 4Q2010.

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[1] Verizon appears to have filed these *Ex Parte* submissions on behalf of its ILEC, IXC (Verizon Business), and CMRS entity (Verizon Wireless). The entities appear to share a common position on this issue.

[2] Letter from Donna Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 (Filed Mar. 26, 2010); Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 (Filed Apr. 27, 2010); Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 (Filed June 28, 2010).

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Verizon presents the Commission with false information about the various actions instituted by CLECs in the wake of the *North County* decision, including Pac-West's complaint filed against Verizon Wireless in California. Contrary to Verizon's assertion, Pac-West does not seek access charges as "reasonable compensation" for intraMTA traffic. Rather, Pac-West seeks to be compensated at the reciprocal compensation rates that the California Public Utilities Commission ("CPUC") established using this Commission's TELRIC methodology, as required by the Telecom Act. To be clear, Pac-West simply wants to be treated no differently, and have the same rights, as the Verizon ILECs, among others, with which it competes. Verizon, however, claims that it is somehow being aggrieved by being "dragged into a growing number of intercarrier compensation disputes before state public utility commissions and courts across the country …." Verizon June 28 *Ex Parte* at 2. The fact is, however, that Verizon is only being "dragged in," at least in Pac-West's case, because Verizon refuses to pay Pac-West at the CPUC's Section 251(b)(5) reciprocal compensation rate. What's more, Verizon Wireless doesn't even pay Pac-West the lower rate of $0.0007, for which it has consistently advocated. This is the essence of a bad faith dispute.

Equally unavailing is Verizon's analogy to ISP-bound traffic. The *ISP Remand Order*'s mirroring rule does not apply here where there is no ILEC and no ISP-bound traffic involved. ILECs, at their option, were permitted to lower their payments to CLECs for terminating traffic to ISPs to $0.0007 per minute so long as the ILECs agreed to reduce the rate they charged other carriers for terminating non-access traffic to $0.0007. That *quid pro quo* has nothing to do with CLEC termination of intraMTA wireless traffic. Verizon effectively suggests that CLECs, on the losing end of the $0.0007 rate for ISP-bound traffic, should now also be required to terminate wireless traffic at that rate, a rate well below that set by the state commissions using the TELRIC methodology. This double-giveback by the CLECs violates basic standards of both law and equity.

The actual victims are the CLECs, like Pac-West, which are left with no option but litigation if they wish to get paid for the termination services they are obligated to perform as common carriers. CLECs, like Pac-West, have been terminating and invoicing Verizon Wireless for intraMTA traffic without compensation for years. Verizon Wireless is attempting to foreclose Pac-West's recovery efforts, by asking the Commission to reset the rules just as Pac-West's complaint against Verizon Wireless is beginning to be considered by the California PUC. Verizon's goal is to leave CLECs in a purgatory of suspended collections actions, with a right of action at neither the federal nor state level, while CLECs continue to be obligated to terminate Verizon Wireless traffic for free. At the same time, ILECs like Verizon, with the force of mandatory Section 252 arbitration to back them up as a result of the FCC's *T-Mobile* decision, have negotiated terminating compensation arrangements with many wireless carriers at TELRIC

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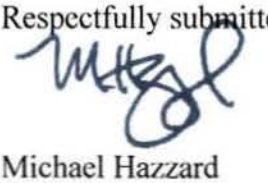
rates.[3] In California, this includes Verizon Wireless, which has executed terminating compensation agreements with ILECs at rates far in excess of those sought by Pac-West. Verizon should not be permitted to continue its years of free termination and the Commission should, absent any change of law, stay the course it chose in *North County*.

Pac-West supports the FCC's current plan to consider all the issues in the 4Q2010 NPRM. There is no record to support extraordinary or expedited relief for CMRS carriers, which have been padding their margins for years by refusing to pay CLECs any compensation for terminating their traffic. When the Commission does consider these issues in the NPRM, if any relief would be appropriate, it would be to extend the *T-Mobile Order* to CLECs so that CLECs have equal access to the 251/252 arbitration process. Verizon's solution of surgically removing the states from the rate-setting process would violate the Sections 251/252 framework. If the states believe that unique 251(b)(5) structures are appropriate, they are perfectly capable of implementing such results.[4] The future consideration of these issues, however, should not interfere with the present efforts of terminating CLECs such as Pac-West to recover past and long overdue compensation for terminating traffic.

Respectfully submitted,



Michael Hazzard
Counsel to Pac-West Telecomm, Inc.

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[3] *See* Attachment A, listing examples of publically filed ILEC/wireless agreements in California.

[4] *See* Attachment B, *Complaint of XChange Telecom, Inc. Against Sprint Nextel Corp. for Refusal to Pay Terminating Compensation*, Case 07-C-1541, Order Granting Motion to Dimiss in Part and Denying in Part and Granting Complaint in Part and Denying in Part (N.Y.P.S.C. Feb. 4, 2010) (ordering CMRS provider Sprint Nextel to compensate CLEC XChange Telecom at the ILEC's (Verizon's) end office termination rate).

ATTACHMENT A

EXAMPLES OF AGREEMENTS BY CALIFORNIA WIRELESS CARRIERS TO PAY TERMINATION COMPENSATION TO LECS

RATE/MOU	SET-UP	CMRS	LEC	SOURCE
$0.0014055		Cricket	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.006990 (Type 1) $0.004164 (2A) $0.001870 (2B)	$0.013965 (Type 1) $0.00813 (2A) $0.007 (2B)	Cricket	AT&T	Cellular PCS Interconnection Agreement by and between Cricket Communications, Inc. and The Pacific Bell Telephone Company, www.att.com/Large-Files/RIMS/Interconnection_Agreements/Michigan/Cricket_Communications_Inc/a_MI-Cricket.pdf
$0.0014055		Nextel of Cal.	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.0014055		Sprint Spectrum L.P.	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.006990 (Type 1) $0.004467 (2A LATA) $0.004164 (2A NonLATA) $0.001870 (2B)	$0.0013965 (Type 1) $0.008279 (2A LATA) $0.008130 (2A NonLATA) $0.007000 (2B)	Sprint/Nextel	AT&T	Interconnection Agreement between Pacific Telephone Company d/b/a AT&T California v. Sprint Spectrum L.P., WirelessCo, L.P., and Sprint Telephony PCS, L.P., jointly d/b/a Sprint PCS (cited in Complaint 09-09-003)
$0.00518		T-Mobile	Pinnacles	ICA filed 2-13-08 in A.06-02-028
$0.011		T-Mobile	Citizens	Citizens AL 790 (3-20-03) and 10-02-05 ICA
$0.0175		T-Mobile	Winterhaven/TDS	Winterhaven AL 179 (1-23-06)
$0.0175		T-Mobile	Hornitos/TDS	Hornitos AL 253 (1-23-06)
$0.0175		T-Mobile	Happy Valley/TDS	Happy Valley AL 283 (1-23-06)
$0.0014055		VoiceStream Wireless (T-Mobile)	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.00112		Verizon Wireless	Kerman	Kerman AL 374 (12-07-09)

EXAMPLES OF AGREEMENTS BY CALIFORNIA WIRELESS CARRIERS TO PAY TERMINATION COMPENSATION TO LECS

RATE/MOU	SET-UP	CMRS	LEC	SOURCE
$0.00118		Verizon Wireless	Calaveras	Calaveras AL 313 (12-07-09)
$0.00341		Verizon Wireless	Volcano	Volcano AL 353 (12-07-09)
$0.00453		Verizon Wireless	Foresthill	Foresthill AL 295 (12-07-09)
$0.00518		Verizon Wireless	Pinnacles	Pinnacles AL 240 (12-07-09)
$0.00603		Verizon Wireless	Ponderosa	Ponderosa AL 393 (12-07-09)
$0.00692		Verizon Wireless	Cal-Ore	Cal-Ore AL 329 (12-07-09)
$0.01096		Verizon Wireless	Ducor	Ducor AL 330 (12-07-09)
$0.00112		AT&T (Cingular)	Kerman	ICA filed 2-13-08 in A.06-02-028
$0.00113		AT&T (Cingular)	Sierra	ICA filed 2-13-08 in A.06-02-028
$0.00118		AT&T (Cingular)	Calaveras	ICA filed 2-13-08 in A.06-02-028
$0.00205		AT&T (Cingular)	Global Valley Networks	ICA filed 2-13-08 in A.06-02-028
$0.00341		AT&T (Cingular)	Volcano	ICA filed 2-13-08 in A.06-02-028
$0.00453		AT&T (Cingular)	Foresthill	ICA filed 2-13-08 in A.06-02-028
$0.00518		AT&T (Cingular)	Pinnacles	ICA filed 2-13-08 in A.06-02-028
$0.00544		AT&T (Cingular)	Siskiyou	ICA filed 2-13-08 in A.06-02-028
$0.00603		AT&T (Cingular)	Ponderosa	ICA filed 2-13-08 in A.06-02-028
$0.00692		AT&T (Cingular)	Cal-Ore	ICA filed 2-13-08 in A.06-02-028
$0.01096		AT&T (Cingular)	Ducor	ICA filed 2-13-08 in A.06-02-028
$0.0014055		AT&T Wireless Services Inc.	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.0014055		Cellco Part. and Pinnacles Cellular	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.0014055		Cellco Part., AirTouch Cellular and Verizon Wireless LLC	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.0014055		Cox Comm. PCS	Verizon CA	Blanket ICA amendment per D.03-03-033

EXAMPLES OF AGREEMENTS BY CALIFORNIA WIRELESS CARRIERS TO PAY TERMINATION COMPENSATION TO LECS

RATE/MOU	SET-UP	CMRS	LEC	SOURCE
$0.0007		Fisher Wireless	Verizon CA	Verizon AL 11819 (3-15-07)
$0.0014055		Pacific Bell Wireless	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.0014055		US Cellular	Verizon CA	Blanket ICA amendment per D.03-03-033
$0.0014055		Western Wireless	Verizon CA	Blanket ICA amendment per D.03-03-033

ATTACHMENT B

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on January 19, 2010

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 07-C-1541 - Complaint of XChange Telecom, Inc. Against Sprint Nextel Corporation for Refusal to Pay Terminating Compensation.

CASE 09-C-0370 - Petition of XChange Telecom Corp. for a Declaratory Ruling Establishing the Just and Reasonable Rate for Termination of Traffic Between Wireless Carriers and CLECs.

ORDER GRANTING MOTION TO DISMISS IN PART AND DENYING IN PART AND GRANTING COMPLAINT IN PART AND DENYING IN PART

(Issued and Effective February 4, 2010)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND

On December 31, 2007, XChange Telecom, Inc. (XChange) filed a complaint against Sprint Nextel Corporation (Sprint) for Sprint's disputed refusal to pay for the termination of wireless calls over XChange's network. XChange requests that the Commission direct Sprint to negotiate an interconnection agreement (ICA) under §251 of the Telecommunications Act of 1996 (the Act) or submit to arbitration under §252 and pay interim compensation as of June, 2005. Sprint denies the allegations and seeks to dismiss the complaint as a matter of law claiming the Commission does not have jurisdiction over a request for an ICA between a competing local exchange carrier (CLEC) and a commercial mobile radio service (CMRS or wireless) carrier.

Subsequently, on April 28, 2009, XChange Telecom Corp.[1] filed an additional request seeking a declaratory ruling on the rate for the termination of traffic exchanged between a CMRS provider and a CLEC.[2]

Section 251(a) of the Act requires every telecommunication carrier to interconnect with other telecommunication carriers. The term telecommunication carrier is broadly defined and includes CLECs, Incumbent LECs (ILECs) and CMRS providers.[3] Under §251(b)(5), all LECs are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications. The Federal Communications Commission (FCC) further stated that traffic to and from a CMRS network that originates and terminates within the same Major Trading Area[4] (e.g., intra-MTA) is subject to reciprocal compensation obligations under §251(b)(5), rather than access charges.[5]

In addition to the various LEC obligations pursuant to §251(b), under §251(c), ILECs are required to negotiate/arbitrate, in accordance with §252, on the particular terms and conditions for the exchange of traffic, including

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[1] To the extent XChange Telecom, Inc. and XChange Telecom Corp. are different entities we will refer to them as XChange collectively herein.

[2] It appears the issues in Case 09-C-0370 involve the same parties. Therefore, we will address both matters here.

[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dockets 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499 (First Report and Order).

[4] MTAs are federally authorized wireless territories and traffic within each MTA is considered local for purposes of reciprocal compensation under §251(b)(5).

[5] Developing a Unified Intercarrier Compensation Regime; T-Mobile, et al. Petition for a Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket 01-92. FCC 05-42 (issued February 24, 2005)(T-Mobile Ruling), ¶3.

reciprocal compensation arrangements. Subsequently, the FCC expanded the scope of the negotiation/arbitration procedures set forth under §252 to allow ILECs to request mandatory negotiation/arbitration from a CMRS provider and submit to the state's jurisdiction.[6] The FCC opted not to expand the scope of the §252 mandatory negotiation/arbitration to LEC-CMRS requests.[7] Therefore, as discussed in more detail below, we find that XChange's request to enter into an ICA under the mandatory arbitration process pursuant to federal law is denied and Sprint's motion to dismiss in that regard is granted. The Commission does not have the authority to arbitrate an ICA between a CLEC and a CMRS provider under §252 of the Act.

However, XChange's request that the Commission establish a reasonable rate for the termination of intrastate wireless traffic under state law is granted and Sprint's motion to dismiss in that regard is denied. Under Public Service Law (PSL) §97(3), the Commission has the authority to establish reciprocal compensation rates for the exchange of CMRS traffic that is consistent with federal standards. The FCC did not preempt state regulation of intrastate rates that LECs can charge CMRS providers for termination of their traffic, except to the extent that states can no longer impose compensation obligations for non-access (i.e., local) CMRS traffic pursuant to tariffs. This determination was recently affirmed by the FCC in its North County Decisions whereby the FCC reiterated that the T-Mobile Ruling does not purport to limit the states' general authority to regulate rates for intrastate wireless

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[6] Id., ¶16. The FCC subsequently amended its rules to reflect this change, see 47 C.F.R. 20.11 and 47 C.F.R 51.715.

[7] Id.

traffic as preserved by §152(b) of the Act, except that LECs cannot impose compensation obligations pursuant to state tariffs.[8]

SUMMARY OF PLEADINGS

XChange's Complaint (Case 07-C-1541)

On December 31, 2007 XChange requested that the Commission exercise jurisdiction over an interconnection dispute between it and Sprint. XChange claims that it is terminating traffic originated by Sprint for which it is not being compensated.[9] The traffic at issue here, according to XChange, involves both local (intra-MTA) and access traffic (where the caller and the called party are not within the same MTA (i.e., inter-MTA).[10] XChange believes that certain FCC orders and rules apply the Act's negotiation/arbitration requirements equally to CLECs (in addition to ILECs) and CMRS providers.[11] As such, XChange believes that the Commission has the delegated authority to order an ICA pursuant to §252 of the Act.

Under state law, XChange anticipates that Sprint may argue that the Commission does not have jurisdiction by virtue of the suspension of PSL to wireless carriers pursuant to §5(6)(a). XChange asserts, however, that the Commission has

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[8] North County Corp. v. MetroPCS California, LLC, File EB-06-MD-007, Memorandum, Opinion and Order (issued March 30, 2009); Order on Review (issued November 19, 2009) (North County Decisions).

[9] Sprint and XChange use Verizon New York Inc.'s (Verizon) tandems to exchange traffic. Some traffic is delivered over local interconnection trunks and some over access toll trunks.

[10] XChange submits that terminating compensation for local traffic is equivalent to reciprocal compensation and non-local traffic is subject to intrastate access charges.

[11] See generally, T-Mobile Ruling; First Report and Order; and, 47 C.F.R. §§20.11 and 51.715.

previously recognized its jurisdiction over wireless carriers despite this suspension.[12]

Sprint's Answer and Motion to Dismiss

On January 22 2008, Sprint answered XChange's complaint denying the allegations and filed a motion to dismiss. As a matter of law, Sprint argues that the Commission's delegated authority under §§251 and 252 is limited to matters involving ILECs and CMRS providers, not CLECs. According to Sprint, XChange's reliance on the FCC's First Report and Order and T-Mobile Ruling is misplaced.[13] Likewise, Sprint asserts that the Commission does not have authority to hear this matter, stating that the Commission's authority is limited to matters expressly delegated to it (i.e, numbering administration and arbitration of ICAs between ILECs and CMRS carriers) by the FCC.

As a factual matter, Sprint asserts that during the course of its negotiations with XChange, Sprint became increasingly concerned with suspicious traffic patterns. From Sprint's perspective, it believed it was not receiving all the relevant information and any agreement between the parties would necessarily need safeguards against manipulation of FCC rules regarding intercarrier compensation and excessive rates-of-return. Sprint also submits that notwithstanding its jurisdictional arguments, XChange's request to charge the higher intrastate access rate for termination is unreasonable. According to Sprint, traffic that is on Verizon's toll trunk may

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[12] E.g., Case 00-C-0789, Omnibus Proceeding, Order Granting in part Petitions for Reconsideration, Clarification or Rehearing of September 7, 2001 Order (issued August 16, 2002).

[13] Sprint acknowledges that the First Report and Order and §251(b)(5) of the Act obligates LECs to establish reciprocal compensation arrangements, but argues that §251 merely requires interconnection of networks which has been accomplished here through indirect interconnection using Verizon's trunks.

very well be toll, but not inter-MTA and should instead be exchanged at the lower reciprocal compensation rate of bill and keep.

XChange's Response

On February 1, 2008, XChange responded to Sprint's motion to dismiss reiterating that CLECs also have the right to request negotiation/arbitration with a CMRS carrier under the Act. Notwithstanding this position, XChange asserts that if §252 (compulsory arbitration) does not apply nothing precludes a state from enacting its own rules for termination compensation under its general supervisory powers. However, should the Commission finds it does not have state or federal jurisdiction, XChange then requests that it be allowed to block traffic from Sprint.

Sprint's Sur-Reply

On February 8, 2008, Sprint reiterated that federal law does not authorize a state commission to arbitrate an ICA between CLEC-CMRS carriers. As to XChange's request to block traffic, Sprint states that the FCC determined that telecommunications carriers are not permitted to block traffic, pending an agreement on the exchange of such traffic.[14]

XChange's Request for a Declaratory Ruling (Case 09-C-0370)

On April 28, 2009, XChange requested that the Commission issue a declaratory ruling[15] that for intra-MTA traffic between CLECs and CMRS carriers, XChange is entitled to

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[14] In the matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers, Declaratory Ruling and Order, WC Docket 07-135, 22 FCC Rcd 11629 (issued June 28, 2007).

[15] We note that a number of companies submitted brief comments on XChange's request for declaratory ruling. While not specifically addressed herein, those comments have been considered.

charge a per-minute of use rate of $0.007914 (consisting of Verizon's tandem reciprocal compensation rate of $0.002893, Verizon's tandem transit rate of $0.001621 and Verizon's record processing charge of $0.003400).[16] According to XChange, the FCC determined that state Commissions have the authority to determine what constitutes reasonable compensation for the termination of CMRS-CLEC intrastate traffic.[17]

Specifically, XChange requests that the Commission declare that Verizon's tandem/non-convergent rate, adjusted for additional costs incurred through the use of Verizon's tandem, apply to traffic between wireless carriers and CLECs. XChange believes these additional costs are justified first, because MTAs are much larger than local access transport areas (LATAs)[18] and second, because CLECs are almost always subject to these extra costs by virtue of their indirect interconnection with wireless carriers which cannot be recovered from end-users.

Finally, with regard to Verizon's convergent/non-convergent traffic rate, XChange states that while the Commission recognized that certain cost efficiencies result when large volumes of traffic are routed in one direction to a limited number of end-points (e.g., Internet Service Providers (ISPs)) and established a convergent rate for such traffic if

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[16] According to XChange, the Commission established that in light of the nature of CLEC networks, and the equivalency of CLEC switches to a Verizon tandem switch, CLECs are entitled to receive the tandem termination rate, Case 94-C-0095, Competition II Proceeding, Order Instituting Framework (issued September 27, 1995), pp. 5-6 (Competition II).

[17] XChange's request is based primarily on an FCC determination that state commissions should decide what constitutes reasonable compensation for the termination of intrastate wireless traffic in the its North County Decisions.

[18] LECs are prohibited from charging access on intra-MTA traffic, but can charge terminating access to wireline toll traffic that is inter-MTA.

the ratio exceeded 3:1, that rate should not apply here. XChange argues that Verizon's convergent traffic rate was designed to protect regulated LECs and their customers from unique Internet calling patterns. XChange states that, wireless carriers, and their end-users rates, are not regulated, but rather subject to market forces. Thus, XChange argues that the rationale for Verizon's convergent rate does not apply and the Commission should instead apply the non-convergent rate.

Sprint's Response

Sprint's May 11, 2009 response states that the North Country Decisions simply reinforce the rule that ILECs, not CLECs, may invoke the arbitration procedures under §252 of the Act and thus, under federal law the Commission has no jurisdiction.

XChange's Sur-Replies

XChange filed two separate responses to Sprint's May pleading dated June 1 and June 4 2009. According to XChange, the North County Decisions make clear that wireless carriers have a duty to negotiate ICAs pursuant to §201 of the Act and, notwithstanding that duty, the Commission enjoys independent authority to establish compensation rates under state law.

DISCUSSION

As a procedural matter, we believe XChange's petition in Case 09-C-0370 does not constitute a request for declaratory relief under our rules because it does not seek a specific interpretation of a Commission rule or statute. Rather XChange seeks a reasonable rate for the termination of wireless traffic, in general. Therefore, the procedures established under our rules at 16 NYCRR §8.2 will not apply in this instance and are not controlling. We will consider XChange's petition in Case 09-C-0370 as a complaint, join issue and proceed accordingly.

XChange argues that the Commission has delegated authority to arbitrate this matter pursuant to federal law and rules under §252. Sprint submits that the federally mandated arbitration procedures are only available where a carrier seeks to interconnect with an ILEC, not where CLECs seek to interconnect with CMRS providers. Accordingly, we first must decide whether a CLEC can invoke the compulsory negotiation/arbitration process under the Act.

The Commission's authority to consider issues raised through the federal interconnection process is set forth in §252(b)(1) of the Act which states that:

> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issue.

The statute does not extend the arbitration authority of the states to circumstances where an ILEC has received a request for negotiation. Our delegated authority does not provide for mandatory negotiation/arbitration of CLEC-CMRS requests.

Moreover, XChange's reliance on the FCC's amended rules is misplaced. The language in FCC Rule 20.11 explicitly states that only ILECs may request interconnection from a CMRS provider and invoke the federal process.[19] FCC Rule 51.715 is equally clear and states that, where a state has established transport and termination rates on a forward-looking basis, an ILEC shall utilize these state determined rates on an interim basis until an ICA is finalized.[20]

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[19] 47 C.F.R. §22.11(e).

[20] Id., § 51.715.

The Commission is only authorized to arbitrate ICAs involving CLEC/ILEC and ILEC/CMRS carriers. We therefore grant Sprint's motion to dismiss to the extent it seeks to preclude XChange's request for an ICA under federal law, but deny the remainder of its motion consistent with the discussion below. Similarly, to the extent XChange seeks to compel negotiation/arbitration under 47 U.S.C. §252, we deny that aspect of its complaint.

We now turn to whether the Commission can resolve this matter under state law. Ordinarily, if the matter involves a question on intrastate traffic the Commission's jurisdiction is broad. However, because the instant request involves traffic originating with a CMRS provider, Sprint argues that the Commission is precluded from exercising any regulatory authority over wireless traffic (including termination) without an express delegation from the FCC. Sprint also argues that PSL §5(6)(a) precludes the application of the PSL to cellular telephone services, unless the Commission makes a determination upon a hearing to end that suspension. To date, the Commission has not made any such finding to apply the PSL to wireless services. XChange believes that under state law, the Commission can exercise regulatory authority and specifically argues that the suspension under PSL §5(6) does not eliminate all Commission jurisdiction over matters involving CMRS providers.

We agree with XChange, in part. There is no dispute that the traffic at issue is jurisdictionally intrastate. Indeed, the FCC recently affirmed that under §152(b) of the Act, state commissions are the appropriate forums to determine what constitutes the appropriate level of compensation to be charged by a CLEC for the termination of intra-MTA wireless traffic and employ whatever non-tariff procedural mechanism they deem

appropriate under state law.[21] That determination effectively dismisses all of Sprint's contentions that the states do not have the jurisdiction to establish rates for the termination of intrastate CLEC-wireless traffic. The only remaining issue is whether establishing a termination rate amounts to regulating wireless services in light of the suspension under PSL §5(6)(a).

We do not believe that the suspension of the PSL to cellular telephone service precludes us from establishing a rate for termination of intrastate wireless traffic to a LEC. The Commission is clearly authorized under PSL §97(3) to establish just and reasonable rates where two or more telephone companies are interconnected. Notwithstanding the prohibition of the PSL under §5(6) regarding wireless service, federal law requires that we treat the traffic here (i.e., intra-MTA) as reciprocal compensation under §251(b)(5) of the Act. The FCC's applicable pricing standards specify that the terms and conditions for reciprocal compensation are considered just and reasonable only if they "(i) …provide for the mutual and reciprocal recovery by each carrier of costs associate with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier and (ii) …determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[22] Therefore, while we are not precluded under PSL from establishing a rate for the termination of wireless traffic to LEC networks, under federal law in order for the rate to be just and reasonable it must also be mutually available to both parties. We will, therefore, proceed in establishing a just and reasonable rate for the termination of wireless traffic under

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[21] See, North County Decisions, Memorandum, Opinion and Order, ¶12, Order on Review, ¶10, *supra*.

[22] 47 U.S.C. §252(d)(2)(a).

PSL §97(3) which will be mutually available to both parties, and direct the parties to enter into negotiations and report back to the Commission within 60 days on how they plan on incorporating that rate into an traffic exchange agreement in accordance with the above FCC's pricing standards.[23]

Under federal law there is a rebuttable presumption that reciprocal compensation payments by one interconnected party to the other are to be symmetric and set on the basis of the ILEC's costs of terminating calls. Federal law allows CLECs (and CMRS providers) the option of seeking higher, asymmetric charges, if warranted. To do so, a CLEC/CMRS provider must submit a study persuasively showing that its own termination costs, properly measured, exceed those of the ILEC's.[24] XChange states in its request for a declaratory ruling that it should be allowed to charge Verizon's tandem/non-convergent reciprocal compensation rate plus certain additional costs.[25] Sprint, on the other hand, believes that absent an agreement on a reciprocal compensation, the de facto rate of bill and keep should apply.[26]

The Commission previously determined in its Competition II Proceeding that CLECs should be entitled to, at a minimum, charge the per-minute Verizon tandem termination rate

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[23] The FCC has precluded the use of state tariff for wireless termination rates (T-Mobile Ruling), however, we read PSL §97(3) broadly to allow for interconnection arrangements other than tariffs, which includes individually negotiated contracts.

[24] First Report and Order, pp. 1056-1057.

[25] XChange's Request for Declaratory Ruling, ¶22.

[26] We previously rejected the notion of bill and keep as less cost-based, inasmuch as it would reflect actual costs only if traffic flows between carriers were at least roughly in balance and see no reason to depart from that finding here, See e.g., Case 99-C-0529, Opinion 99-10, (issued August 26, 1996), p. 3.

if their networks were functionally equivalent to Verizon's.[27] However, we are advised by Department Staff that in this particular situation the functionality of XChange's network is not operationally equivalent to a tandem arrangement since the calls coming into the XChange switch are terminated to customers on that switch and not routed to other XChange local switches for termination. Since XChange's network does not replicate the functionality of a tandem, but only an end office switch, it is appropriate that the rate reflect the cost associated only with end office call termination. Therefore, we will allow XChange to charge a per-minute of use rate equal to Verizon's end office termination rate (i.e., $0.001069) because that architecture more reasonably represents XChange's network configuration. The tandem reciprocal rate and additional costs that XChange seeks to apply (i.e., tandem transit rate and record processing fee) are not warranted because XChange has not made a showing that they are appropriate here. In our Order Instituting Framework for Directory Listings, Carrier Interconnection, and Intercarrier Compensation (issued September 27, 1995), the Commission addressed the interconnection of incumbent and CLEC networks as it related to equal meet point rates. The Commission found that even if a CLEC did not have a tandem, as long as its network provided the incumbent access, functionally equivalent to a tandem, it would be allowed to charge the incumbent's tandem rate at the meet point. In the instant petition, XChange fails to meets the criteria for charging the tandem meet point rate because its network is not set up to receive all calls to XChange customers at a single interconnection point. That is, XChange does not have the ability to terminate calls to all customers served by delivery

[27] Competition II, pp. 5-6.

to a single point of interconnection. Therefore, we find that the end office termination rate is more appropriate.

We also find that it is premature to apply Verizon's convergent traffic rate since Sprint has not demonstrated that XChange is using its business to exploit standard intercarrier compensation arrangements. There is no evidence that XChange is involved in a traffic pumping scheme whereby XChange has a relationship with certain end-users in an effort to generate large one-way call volumes, thereby exploiting intercarrier compensation.[28] In any event, the termination rate in this matter is being set well below the intrastate access charge rate (and interstate state rate for that matter) and Sprint is free to petition the Commission to consider the appropriateness of a convergent rate (as identified by the FCC and used, in that case, for ISP bound traffic) on a showing that the traffic imbalance between the XChange and Sprint networks warrants such treatment.

We deny XChange's request for interim rate relief because the rate we establish today will apply prospectively. Any retroactive relief is not appropriate given that, up until now, the Commission has not acted in establishing a rate for the exchange of this type of traffic and no agreement exists governing the party's interconnection. It would be difficult for XChange to demonstrate that Sprint would otherwise be liable for a rate that has not yet been determined.

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[28] We note that a terminating carrier is entitled to collect intercarrier compensation for terminating calls to its end users with the understanding that the call is in fact terminated (i.e., to an end user directly connected to the end office switch). Any call routed off the terminating end office switch by any means including protocol conversion may not be considered terminated and, therefore, reciprocal compensation may not apply. If any of XChange's traffic falls under this category it may not be subject to the reciprocal compensation rate established herein.

Lastly, XChange's request to block Sprint's traffic is denied. Because we have established a just and reasonable rate for the termination of Sprint's traffic, XChange's request is at best premature. If Sprint continues to rebuff XChange's request for reasonable compensation, then we may consider such request at a later time.

CONCLUSION

Sprint's motion to dismiss is granted in part and denied in part and XChange's complaint is granted in part and denied in part. While the Commission is not authorized to act under federal law, under state law the Commission can establish a rate for the termination of wireless traffic over the PSTN.

The Commission orders:

1. Sprint Nextel Corporation's motion to dismiss is granted in part and denied in part consistent with the body of this Order.

2. XChange Telecom, Inc.'s (XChange) complaint is granted in part and denied in part consistent with the body of this Order.

3. XChange Telecom Corp.'s (XChange) request for declaratory ruling is, to the extent it seeks declaratory relief, denied and the remainder is denied in part and granted in part consistent with the body of this Order.

4. Within 60 days, Sprint Nextel Corporation and XChange shall enter into negotiations on the exchange of their traffic consistent with the discussion in this Order and report back to the Commission on how they plan on incorporating the rate into a traffic exchange agreement in accordance with the Federal Communications Commission's pricing standards.

5. The Secretary may extend the deadlines set forth in this order.

6. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary